

Sabo & Zahn
233 S. Wacker Dr.
Suite 8620
Chicago, IL 60606
312-655-8620
312-655-8622 fax
[Http://www.sabozahn.com](http://www.sabozahn.com)

Sabo & Zahn

Attorneys at Law

Contracts

A guy walks into our office with a construction dispute. He is an (architect, engineer, owner — you fill in the blank). One of the first questions we ask is about the contract. He hands us the document. We look at the last page and find no signature.

What's going on here? Is there a contract or not? There obviously is a contract because our client did a lot of work and the other side paid for at least some of the work. But, what exactly is the contract? Is it the unsigned proposal? Is it some verbal agreement that preceded the unsigned proposal? Is it some verbal agreement that was entered after the unsigned proposal?

This situation comes up all the time with construction projects. We have encountered many situations where the architect/owner agreement is finalized just before substantial completion. At other times, the owner will not sign the architect's contract until his lender forces him to, but only because the lender's own internal rules require such a contract before the lender will fund the loan. Contractors, particularly subcontractors, will often start work based on some verbal agreement. Maybe the contractor gets a signature from the architect or "construction manager" on a purchase order.

Each situation is unique. However, there is a common theme here, which is to get a signed contract that spells out the actual deal before any substantive work is started. Don't work without a written contract. While an oral contract is enforceable, there is always a question as to what the terms were. When there is a dispute, the parties will have significantly different recollections of the verbal agreement. A signed contract will prevent this situation.

Taking the time to prepare a written contract will force the parties to think about a variety of issues. These include whether or not to include mediation and arbitration; the payment terms; what happens if there is a default; what the parties are not responsible for; what are the assumptions of the agreement; insurance provisions; copyright provisions; and so forth.

This article is not legal advice. Consult with an attorney familiar with the law in your area.

Sabo & Zahn
233 S. Wacker Dr.
Suite 8620
Chicago, IL 60606
312-655-8620
312-655-8622 fax
[Http://www.sabozahn.com](http://www.sabozahn.com)

Take the following example: An architect proposes to enter into a contract with an owner which calculated the fee in two alternative ways, dependent on the final construction delivery method. The owner, however, never signed the contract. When the owner chooses the higher-cost delivery method and pays the architect the lower fee, the architect will likely be angry. He should, however, be angry at himself for proceeding with the project without a signed contract. Now he faces an expensive lawsuit to recover the higher fee, with no certainty of actually winning, because the parties will provide contradictory testimony regarding the contract terms.

Consider also the contractor who has a signed contract, but fails to get signatures on all change orders before doing the work. Such a contractor will likely become involved in litigation that could have easily been avoided with a simple document signed by both the owner and contractor. Contractors should never perform extra work on a project without signed authorization from the owner.

Signed contracts solve a number of problems for the party making a claim. One is the identity of the other party. Often, it is not entirely clear as to who takes responsibility for payment. When a supplier delivers materials for a project, who is responsible for payment? Architects and construction managers often sign purchase orders or delivery tickets under their own names without disclosing the identity of the actual owner or the fact that they are acting as agent for the owner. If you are acting as an agent for an owner in this situation, make sure that you disclose this fact to the supplier or contractor. Make sure that all purchase orders, delivery tickets and other documents show the owner's name and not yours, otherwise you may be responsible for the payment. You will be named in the lawsuit if the supplier is not paid, because your name is on the document.

For any contractor or supplier working on a governmental project, a signed contract is a must. As an example, assume that the owner is a municipality that is working on a small sewer project. A major problem develops on the project that requires immediate action. The engineer knows a contractor with just the right equipment for the project. This contractor is assured by the engineer and the mayor that the contractor will be promptly paid for the work. Without a signed contract, however, the law in most jurisdictions is that the contractor may not get paid for his work because there was no contract executed by the proper governmental authority.¹ Usually, this means that an ordinance must be passed and a contract signed.

This article is not legal advice. Consult with an attorney familiar with the law in your area.

Sabo & Zahn
233 S. Wacker Dr.
Suite 8620
Chicago, IL 60606
312-655-8620
312-655-8622 fax
[Http://www.sabozahn.com](http://www.sabozahn.com)

Even if the mayor or a commissioner gives an approval, payment is not assured without all of the legalities being followed.

Another situation is where the architect directs the general contractor to do some extra work on the project. Is the owner required to pay for this additional work? This can be a complicated question depending on the exact circumstances, but there is a significant chance that the owner may not be required to pay for this work. Under most contracts, the architect is not an agent for the owner, merely a “representative.” The contractor must realize that only the owner or an owner’s designated agent can legally bind the owner. The smartest thing for the contractor to do is to insist on a written signature by the owner before any work on a change order is started.

How about this scenario: You have worked for your good friend, Bob, for many years. You trust him, so you don’t need a written contract. Half way through the project, Bob dies. You then learn that Bob’s estate has assigned your oral contract to Evil Fred. You are likely stuck with the situation. If you had only used a standard AIA contract, which prohibits most assignments of the contract, you would not have this problem.

What do you do about this? First, always have a written contract for every project. Second, don’t use a homemade letter agreement. It’s alright to have a proposal, but this should be incorporated into the real contract once agreement is reached. You should not be starting work before this point anyway. Third, make sure that the contract says what you want it to say. In other words, read it before you sign it! Make sure that the people in your office who are responsible for the contract understand the provisions of the contract. If that contract requires you to do something and you fail to do it, you are in breach of the contract. Finally, pick and choose your clients carefully. If the other party does not want to sign a written contract before you start the work, consider whether you want to work for this client, because you may not get paid.

Good business practices earn the respect of your clients. Don’t be afraid to ask for a written contract. If you don’t get a written contract, don’t do the work!

Werner Sabo, FAIA, CSI
James K. Zahn, FAIA, CSI

1. For instance, in *Galion Iron Works v. City of Georgetown*, 54 N.E.2d 601 (1944), the plaintiff brought suit against a municipality for the rental value of a grader. Without the proper approvals by the municipality, the transaction was void and the contractor was not entitled to any payment.

This article is not legal advice. Consult with an attorney familiar with the law in your area.